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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6527

JAMES INGRAHAM, by his mother and next friend, ELOISE INGRAHAM, and ROOSEVELT ANDREWS, by his father and next friend, WILLIE EVERETT,
Petitioners,

vs.

WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON BARNES; EDWARD L. WHIGHAM; and THE DADE COUNTY SCHOOL BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

Florida Statutes

The Florida statutory law concerning corporal punishment in public schools was significantly changed and expanded, effective July 1, 1976. Petitioners do not challenge the validity of any statute, but they do refer only to the superseded law. For this reason, and because we make reference often in this brief to the old and new laws, we set them forth here.

Florida Statutes sec. 232.27 formerly provided the only statutory reference to corporal punishment (Florida Statutes 1975, Vol. 1, p. 1047).

> 232.27 *Authority of teacher.* — Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. Under no circumstances may a teacher (except of a one-teacher school) suspend a pupil from school or class.

The Florida Legislature in its 1976 session enacted Laws of Florida Ch. 76-236, as yet not integrated into the official Florida Statutes. The full text may be found in West's *Florida Session Law Service*, No. 3, p. 538. It covers a number of subjects related to student conduct and discipline, and amends former sec. 232.27, as well as adding other provisions relating to corporal punishment. The relevant sections of the new law are excerpted below.

> 228.041 *Specific definitions*
>
> Specific definitions shall be as follows and wherever such defined words or terms are used in the Florida School Code they shall be used as follows:
>
> (28) *Corporal punishment.*—Corporal punishment is the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules.
>
> • • •
>
> 230.23 *Powers and duties of school board*
>
> The school board, acting as a board, shall exercise all powers and perform all duties listed below:
>
> (6) *Child welfare.*—Provide for the proper accounting for all children of school age, for the attendance and control of pupils at school, for proper attention to health, safety, and other matters relating to the welfare of children in the following fields, as prescribed in chapter 232.
>
> (c) *Control of pupils.*—Adopt rules and regulations for the control, discipline, suspension and expulsion of pupils and decide all cases recommended for expulsion. Suspension hearings are exempted from the provisions of Chapter 120. Expulsion hearings shall be governed by the provisions of s. 120.57(2). Provided,

however, that the school board shall not have the authority to prohibit the use of corporal punishment as provided in this act.

(d) *Code of student conduct*—Make available to all teachers, school personnel, students, and parents or guardians, at the beginning of the 1977-1978 school year and every school year thereafter, a code of student conduct developed in consultation with teachers, school personnel, students, and parents or guardians. The code shall be based on the rules governing student conduct and discipline adopted by the school board and may be made available at the school level in the student handbook or similar publication. The code shall include, but not be limited to: specific grounds for disciplinary action; procedures to be followed for acts requiring discipline, including corporal punishment; and an explanation of the responsibilities and rights of students with regard to attendance, respect for persons and property, knowledge and observation of rules of conduct, the right to learn, free speech and student publications, assembly, privacy, and participation in school programs and activities.

* * *

232.27 *Authority of teacher*

Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other

places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed:

(1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.

(2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.

(3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other teacher or principal who was present.

232.275 *Liability of teacher or principal*

Except in the case of excessive force or cruel and unusual punishment a teacher or other member of the instructional staff, a principal or his designated representative, or a bus driver shall not be civilly or criminally liable for any action carried out in conformity with the state board and district school board rules regarding the control, discipline, suspension and expulsion of students.

School Board Regulations

The Dade County School Board policy on corporal punishment, with its several revisions and an implementing regulation prescribing specific guidelines adopted in 1971, are reproduced in full in the Appendix at 125-132.

QUESTIONS PRESENTED FOR REVIEW

We accept petitioners' first question as accurate.

Their second question as stated we cannot accept, for reasons we explain at length in argument later (*infra*, pp. 45-47). Substituting "any" for "severe", we restate the question:

> DOES THE INFLICTION OF ANY CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

STATEMENT OF THE CASE

Petitioners' review of the procedural history of this case, through the original opinion by a panel of the Court of Appeals and its supersession by the *en banc* decision now under review, is adequate.

The statement of facts, however, designed by petitioners to show an "ambience of oppression" and consisting only of selected excerpts of student testimony concerning paddlings at one junior high school, is hardly complete or fair. We give the additional statement below in order to offer a better perspective for the argument which follows.

The Dade County public school system is the sixth largest in the nation, having in 1972, when this case was tried, 237 schools with an elementary-secondary student population of over 240,000, and employing some 12,000 instructional personnel (App. 43-44). Its annual budget in 1972 (App. 45) was close to $300,000,000 (the figures shown in the record as thousands rather than millions are simple transcription errors).

The Superintendent of the school system, an experienced educator, discussed the various methods available for maintaining order and good behavior in the schools, beginning with adequate instructional programs to suit student needs and ranging through student civic participation, personal conferences with students and parents, the utilization of specialized staff such as visiting teachers and psychologists, curriculum adjustments, corporal punishment, and suspension from school for limited periods (App. 47-49). Acknowledging differences of opinion among educators about the use of corporal punishment, he described it as seen to be a useful technique under certain circumstances and as having the purpose of keeping the punished student in school, in contrast to suspension or expulsion which terminate the student's education temporarily or permanently (App. 50-51).

At the time the case was tried, Florida law authorized corporal punishment in defining the authority of the teacher to keep order, but provided that the punishment could be used only after consulting with the principal. Florida Statutes sec. 232.27 (quoted in full *supra* at p. 2). The Dade County School Board's policy authorizing corporal punishment "as a means of changing the behavior of the student" reiterated this requirement, placing the responsibility on the principal to determine the need and fix the time, place and person to administer punishment. The policy provided that the student should understand the seriousness of the offense and the reason for the punishment, that the time between offense and punishment should not be so long as to cause undue anxiety to the student, and that punishment was to be administered in kindness and in the presence of another adult, under conditions not calculated to hold the student up to ridicule or shame. (The policy, as effective in 1970 and as revised twice, is reproduced at App. 125-130. An implementing regulation to the last revision, specifying guidelines for school personnel, is at App. 131-132.)

The Superintendent in his testimony affirmed his view that the principal, as the person passing judgment on all the practices in his school, was the proper decision-maker for the use of corporal discipline (App. 53). He saw it as desirable that the punishment, if used, follow the offense quickly, to avoid building undue concern in the mind of the student (App. 51-52). He considered the posting of a detailed list of infractions, as causes for corporal punishment, as undesirable because tending to remove any judgmental aspects from disciplinary choices (App. 52).

Statistics embodied in a stipulation showed variations in the employment of corporal punishment in the school system, depending upon local school policy (App. 141-145). Sixteen schools did not administer corporal punishment at all. The principal of Miami Beach Senior High School cast light upon this, testifying that he found it philosophically unacceptable, but also unnecessary in his school, which serves a predominantly Jewish population with a culture of oral persuasion and strong family response. The principal also said, though reluctantly, that he would choose corporal punishment as preferable to expulsion, if it were corrective to the student (R. 778-781, 787).

Less creditably, the statistics and the testimony at trial reflected failures of adherence to the School Board policy, in that some teachers did not first confer with the principal, more than the authorized number of strokes were sometimes given, and an adult witness was not invariably present. The District Judge noted this in his order of dismissal, while observing that:

> "With the exception of a few cases, the punishments administered have been unremarkable in physical severity. The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school."
>
> (App. 152)

That school was Drew Junior High, from which almost all of the student witnesses at the trial were drawn. Aside from the preponderance of students from this one school, it will be noted that only the plaintiffs' witnesses testified at the trial. The accused individual principal and his assist-

ants had no opportunity to give evidence, and aside from several school personnel called as adverse witnesses for limited purposes, the testimony came only from selected students and some of their relatives.

This testimony, focusing on one school out of 237, did show (again assuming the students' credibility) some *instances* of severe paddling by one or more of the three individual defendants. However, we reject petitioners' colorful conclusion that the evidence showed despotism, or an "atmosphere of oppression" at Drew Junior High. If the record is read without creative effort, it does not display any preconceived pattern or practice of severity at the school, or as to all students in the school, but only shows that a relatively few students received severe paddlings.

Almost without exception, the students who were punished, including the ones punished severely, (1) knew why they were punished; (2) progressed normally in school, both before and after attending Drew; and (3) were sometimes embarrassed but not otherwise shown to be affected in their reputations or their prospects for further schooling or employment (the many references to the record to support these conclusions may be found in our later argument in this brief, at pp. 52, 56, and 60).

SUMMARY OF ARGUMENT

I

THE EIGHTH AMENDMENT HAS BEEN AND IS NOW LIMITED TO PUNISHMENTS ANNEXED TO CRIMES, AND SHOULD NOT BE EXTENDED TO CORPORAL DISCIPLINE IN PUBLIC SCHOOLS

While occasional instances of abuse may occur, the Eighth Amendment does not provide, and should not be distorted to find, a federal cause of action for every incident of corporal discipline in public schools which may be perceived as excessive by a parent or student.

The Eighth Amendment affords a remedy only if a hardship suffered is "punishment" within the constitutional intendment of the term. Historically, the Amendment descends directly from the "English Bill of Rights of 1689" by which Parliament acted to forbid the incredible cruelties which were being inflicted by English courts as punishments for crimes.

Not only origin and intent, but consistent interpretation by this Court, limits the scope of the cruel and unusual punishment clause to penalties imposed in connection with the process of criminal adjudication. The Court has always, as a threshold test, found a criminal process nexus between the punishment and the act which gave rise to it. Corporal discipline in public schools is entirely unrelated to the criminal process, and the one decision by a court of appeals which holds the Eighth Amendment applicable to school discipline is devoid of analysis or other reasoned support.

While this Court has extended the application of the clause since its adoption, the expansion has always been in the interpretation of the terms "cruel and unusual," never in the basic class to which the Eighth Amendment applies—those punished pursuant to the criminal process. The decision in *Trop v. Dulles*, 356 U.S. 86 (1958), from which petitioners argue that any "penal" act invokes the Eighth Amendment, actually illustrates most clearly the true limits of the Amendment. The penalty, loss of citizen-

ship, was held cruel and unusual only after it was seen by the Court as having been inflicted collateral to a criminal conviction. In its companion case, *Perez v. Brownell*, 356 U.S. 44 (1958), the Court permitted exactly the same penalty, loss of citizenship, when imposed for the performance of a civilly precluded act.

Other precedent and policy considerations also forbid the radical extension of the Eighth Amendment to discipline in public schools. State legislation and common law clearly sanction corporal discipline as an approved measure for maintaining an orderly climate for learning, and for correcting misbehavior. Even severe cases are not cognizable as "federal torts" under 42 U.S.C. sec. 1983, which is not a broad-gauge vehicle providing a federal remedy for every case of official harm. On the other hand, perfectly adequate state remedies exist. The application, by some lower courts, of the Eighth Amendment to protect confined prisoners is consistent with the true limits of the Amendment, and in any case is not analogous to discipline in public schools. The purpose of educational corporal discipline is corrective, not penal or retributive, and schools, unlike prisons, are open and subject to parental oversight and public scrutiny.

Corporal discipline is a traditional means of keeping order in schools. Even the occasional non-traditional instances of severe punishment cannot properly be viewed as "constitutionally suspect," as petitioners contend, or else the Eighth Amendment is open to provide a test in federal court of every alleged "severe" or "disproportionate" educational decision imposing a hardship upon a child in school—and beyond that, the Amendment would

also be open as a wellspring of new tort litigation over incidents of other official immoderation in discharging civil functions.

Finally, by any view the punishments reflected by the record below do not rise to the proportions of Eighth Amendment violations, as the District Judge who tried this case specifically found.

II

ROUTINE CORPORAL DISCIPLINE IN PUBLIC SCHOOLS TAKES NO PROPERTY AND HAS TRIVIAL EFFECT ON A STUDENT'S LIBERTY. EVEN MINIMAL DUE PROCESS PROCEDURES ARE UNNECESSARY AND UNDESIRABLE.

The question posed by petitioners in their argument for due process procedures is paradoxical and inappropriate, and must be revised. Obviously, no amount of prior due process could legitimize an excessive punishment, and no workable or sensible formula can be drawn which would pertain only to "severe" corporal punishment. The true issue is whether the Fourteenth Amendment mandates due process procedural steps before *any* administration of corporal punishment to public school students.

This Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), honoring while distinguishing prior warnings by the Court against judicial interposition in the public school systems, takes the federal judiciary as far as it should go into the oversight of educational decision-making. The line should and can be clearly drawn between suspensions from school, afforded minimal due process by *Goss*, and corporal discipline.

This Court in *Baker v. Owen*, 423 U.S. 907 (1975), affirmed the authority of school administrators to use corporal punishment even over parental objections. The Court should not be induced to frustrate that authority by unsound comparisons between suspensions and corporal discipline. The Court in *Goss* found suspension to be deprivation of a substantial property interest in education conferred by state law, with consequential effects upon the student's employment prospects and reputation. By contrast, the very purpose of corporal discipline is to avoid exclusion of the student from the educational process. Thus no property interest is involved in routine cases of punishment, and the record below shows no evidence of educational retardation, much less deprivation, to the punished Dade County students.

Nor does corporal discipline implicate any realistic "liberty" interest. No state or federal law guarantees a student the right to attend public school free of physical discomfort as punishment for misconduct. Petitioners' resort to the Fourth Amendment as a guarantee of privacy is totally without precedent and was never argued below. Routine punishment is furthermore a trivial interference, not a deprivation, insofar as the student's liberty is concerned, and cannot be equated with a suspension as a "serious event in the life" of a child. No reputational injury ensues, as the record below shows. Neither future education nor employment prospects are jeopardized by school records of spankings, which in any event are protected from publicity by both Florida and federal law.

Balancing the interests of students in avoiding mistaken corporal punishment against the needs of educators for effective and efficient disciplinary alternatives, Amer-

ican history and American law clearly approve of corporal discipline and trust educators to administer it, while providing remedies against child abuse. The Court should not destroy that balance by imposing constitutional mechanics, and making federal court the forum for review of a new multitude of day-to-day educational decisions.

Even the "minimal" procedures suggested by petitioners are unnecessary, undesirable, and unworkable. Any attempt to prepare a catalogue of specific misbehavior warranting corporal punishment would either be too general to be informative to young children, or ineffective to encompass every possibility of juvenile mischief, and would remove judgmental discretion from educators in dealing with behavior problems.

Notice and an opportunity to be heard are by any common sense view already inherent in common experience of teacher-pupil relationships. Only in the rarest case will a student not know why he is punished or have a chance to explain, and the record in this case demonstrates that the students who testified did indeed know why they were punished and many did deny misconduct.

Florida law in its current form provides the elements of notice, and requires written procedures for administering corporal punishment, and the Dade County School Board has for years regulated the practice. It does not follow that additional constitutional procedures are necessary, if the principle of local control of education retains any vitality. A new federal mandate of procedural steps prior to any instance of corporal discipline can only be seen by educators as a frightening invitation to more federal litigation, with possible personal liability, over claims

of procedural flaws in decisions to utilize this form of discipline. The expected results would be over-formalization of procedures, for the protection of conscientious administrators, or the discarding of corporal discipline as a viable measure, with a resort to suspension and expulsion for misbehavior now seen as correctible by punishment. Neither alternative is sensible as a goal.

Petitioners' suggestion that a neutral arbiter is necessary for each decision to use corporal discipline is a novel conception, and would surely guarantee a formal process, with delay and anxiety for the student, an adversary and unseemly atmosphere of adjudication, and untold administrative complications and diversion of school resources.

Due process procedures have their true and vital functions, but they have no proper place in this traditional and routine area of school administration.

ARGUMENT

I

THE ORIGIN, INTENT AND UNBROKEN INTERPRETATION OF THE EIGHTH AMENDMENT LIMIT ITS APPLICATION TO CRIMINAL PUNISHMENTS. IT SHOULD NOT BE EXTENDED TO PROVIDE A SOURCE OF FEDERAL TORT ACTIONS ARISING FROM CORPORAL DISCIPLINE IN PUBLIC SCHOOLS.

Whether or not the Eighth Amendment to the United States Constitution applies to the use of corporal punish-

ment as a disciplinary measure in public schools is now before this Court for the first time. The Fifth Circuit, in the *en banc* decision now under review, holds the Eighth Amendment inapplicable, with the only genuine analysis given by any court which has considered the question.

The implications of a contrary interpretation, extending the reach of the Eighth Amendment to permit a federal cause of action in the case of every school paddling perceived by a student or parent to have been excessive, are enormous. The petitioners' argument for extension, however, largely begs the key question of constitutional interpretation, while spending much emotion in attempting to persuade the Court that because instances of abusive corporal discipline may and do occur, a constitutional remedy must necessarily exist (or be created). Petitioners do their best to present this as a hard case, and since the record below consists only of the plaintiffs' evidence in the trial court, it lends itself to indignant treatment with respect to the testimony of some of the student witnesses. Nevertheless, hard cases still tend to make bad law, and even worse constitutional law—and indignation, we suggest, is hardly a reliable source of guidance in testing the limits of constitutional provisions.

The limits of the Eighth Amendment's prohibition against cruel and unusual punishment can be tested by history, precedent, and policy. None of these approaches permit the wholesale importation of school discipline cases within the constitutional text.

A. THE IMPOSITION OF CORPORAL EDUCATIONAL DISCIPLINE IN PUBLIC SCHOOLS IS NOT "PUNISHMENT" WITHIN THE SCOPE OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

For a constitutional remedy to be found under the cruel and unusual punishment clause, it is first necessary that the hardship suffered be "punishment" within the constitutional intendment of the term. It is semantically easy for petitioners to equate paddling with punishment, but this literal equation is false, for the term "punishment" as understood and interpreted in legal history and in the decisions of this Court has uniformly meant the penalty imposed either concurrent with or as a result of a criminal prosecution. This interpretation of the term has been consistent from the beginning.

1. Historically the Cruel and Unusual Punishment Clause Was Directed at Criminal Penalties.

Legal historians generally agree that the cruel and unusual punishment clause had its origin in the "English Bill of Rights of 1689." *See* J. Story, *On The Constitution Of The United States* §1903 at 680 (3rd Ed. 1858), *cited in Furman v. Georgia*, 408 U.S. 238, 317 (J. Marshall, concurring). *See also* Rutland, *The Birth Of The Bill Of Rights*, 1776-1791 at 9 (1955). The incidents of torture and barbarism inflicted under the reigns of some of the Stuarts drove Parliament to limit the power of government in its imposition of punishments. J. Story, *supra* at

681. A review of the incredible cruelties inflicted during that period indicates the punishments which inspired Parliament to act.[1]

The critical historical fact is that the governmental limitations imposed by this clause on the infliction of punishment were exclusively directed toward the process of criminal prosecutions. 4 W. Blackstone, *Commentaries* *376-77.

An identical understanding of the clause is evidenced in American legislative history. In his edition of Blackstone's Commentaries, St. George Tucker noted those aspects of the Commentaries which had an impact on the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia. Of particular significance here are his notations concerning the infliction of cruel and unusual punishments.

In Chapter 29, "Of Judgment and It's (sic) Consequences", Blackstone enumerated the multifarious criminal penalties prescribed by the law and meted out by the courts. 4 W. Blackstone, *Commentaries*. Tucker's footnotes to this section exhibit a clear indication that the enumeration was critical to the consideration surrounding the adoption of the Virginia Declaration of Rights. 4 W. Black-

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[1] 4 W. Blackstone, *Commentaries* *376-78.

Included among the available penalties were: being drawn and dragged to the place of execution; embowelling alive; beheading; quartering; burning alive; mutilation by removal of a hand or an ear; lasting stigma by slitting nostrils, or branding on the hand or cheek.

Blackstone further commented that those were considered the more humane punishments when contrasted with the penalties imposed in Civil Law Countries.

stone, *Commentaries* *376 (Tucker Ed. 1803, Notes 4-7). Following the debates, the English version was adopted verbatim.

Subsequently, the issue again arose during the debates of the Convention of Virginia meeting for the purpose of Federal Constitutional Ratification. Patrick Henry addressing the assembly on the necessity for a Federal Bill of Rights stated:

> "Congress, from their general powers, may fully go into business of human legislation. They may legislate, in *criminal* cases, from treason to the lowest offence—petty larceny. They may *define crimes and prescribe punishments.* In the definition of *crimes,* I trust they will be directed by what wise representatives ought to be governed by. But when we come to *punishments,* no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. . . . In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding ex-

> cessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."

3 *Elliot's Debates* 447 (emphasis added).

Clearly, this passage indicates the common understanding of the clause within the assembly.

History also indicates, contrary to petitioners' assertions, that at the time of the conventions for ratification of the Constitution and the Bill of Rights, systems of public education were in operation, and were familiar to the framers of our federal charter.

Colonial legislatures used the town as a civil subdivision of the state to govern and operate local political and school affairs. In Massachusetts in 1789, the legislature enacted laws establishing the power to create independent public school districts. Edwards and Richey, *The School In*

The American Social Order 110-112 (1947); Knezevich, *Administration Of Public Education* 113-114 (2d Ed. 1969).

Federal educational activity, as well, commenced prior to the adoption of the Constitution and Bill of Rights. The Continental Congress enacted the Ordinance of 1785 which contained public educational provisions. It stated, "there shall be reserved the lot number 16 in each township for the maintenance of public schools in said township . . ." Two years thereafter in the Ordinance of 1787, commonly known as the Northwest Ordinance, the Congress reiterated its support for public education, stating, "schools and the means of education shall forever be encouraged."

We do not argue here that school punishments were consciously *excluded* by the framers of the Eighth Amendment—no doubt the question never crossed their minds. Our point is, in this historical inquiry, that neither public schools nor corporal discipline in schools were unknown to the fathers of the Constitution, and there is nothing to suggest that they contemplated its inclusion within the reach of the Amendment.

2. Controlling Judicial Interpretation Has Consistently Limited the Scope of the Clause to Punishments Inflicted Concurrent with, as a Result of or Subsequent to the Criminal Process.

The decisional law which has developed subsequent to the adoption of the cruel and unusual punishment clause by both state and federal governments, has reiterated the understanding that the clause applies only to the criminal process.

This Court has consistently held that the cruel and unusual punishment clause does not apply to non-criminal penalties. In *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), the Court considered and rejected a petition for habeas corpus based on the cruel and unusual punishment clause. The petitioner had been ordered deported as the result of a non-criminal procedure. Justice Gray for the Court, stated:

> "The order of deportation is not punishment for *crime* . . . Therefore the provisions of the constitution . . . prohibiting . . . cruel and unusual punishments, have no application."

Civil contempt proceedings have also been challenged on cruel and unusual punishment grounds before this Court. In *Uphaus v. Wyman*, 360 U.S. 72 (1959), a corporate official refused to comply with a subpoena duces tecum calling for production of names contained on a list in his possession. The petitoner was found in civil contempt and ordered confined until he complied. One issue raised on appeal was whether this confinement constituted cruel and unusual punishment. The Court concluded that continued disobedience to a valid civil order resulting in confinement gave rise to no constitutional objection.

This same construction of the cruel and unusual punishment clause has been rendered by both federal and state courts. *Mahler v. Eby*, 264 U.S. 32 (1924); *Bugajewitz v. Adams*, 228 U.S. 585 (1913); *In re Chin Wan*, 182 F. 256 (D. Ore. 1910), *aff'd sub nom.* 187 F. 592 (9th Cir. 1911); *Soewapadji v. Wixon*, 157 F.2d 289 (9th Cir. 1946) *cert. denied*, 329 U.S. 792; *Germany v. Hudspeth*, 209 F.2d

15 (10th Cir. 1954). State Courts: *Ex parte Naccarat*, 328 Mo. 722, 41 S.W.2d 176 (1931); *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942).

The converse of the principle of civil exclusion is criminal inclusion. In all cases in which this Court has confronted the cruel and unusual punishment clause, there has been a criminal nexus upon which to proceed to full consideration.*Gregg v. Georgia*, _____ U.S. _____, 96 S.Ct. 2909 (1976) (Death penalty imposed for armed robbery and murder); *Furman v. Georgia*, 408 U.S. 238 (1972) (Death penalty imposed for the commission of a murder); *Robinson v. California*, 370 U.S. 660 (1962) (Crime to be addicted to narcotics); *Trop v. Dulles*, 356 U.S. 86 (1958) (Penalty imposed as a direct result of a criminal conviction for desertion); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (Death penalty reimposed after failure of execution equipment used in previous execution attempt); *Weems v. United States*, 217 U.S. 349 (1910) (Punishment inflicted for commission of a crime not proportional to the nature of the crime committed); *In re Kemmler*, 136 U.S. 436 (1890) (Electrocution as a punishment for commission of crime not cruel and unusual); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (the use of firing squad to carry out punishment for crime not cruel and unusual).

This requirement of criminal process as a prerequisite was addressed by this Court in *Powell v. Texas*, 329 U.S. 514, 531 (1968). In discussing the applicability of the cruel and unusual punishment clause, Justice Marshall stated:

> "The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of *criminal* statutes . . . (emphasis added).

As support for this proposition, Justice Marshall cited *Trop*, *State of Louisiana ex rel. Francis*, and *Weems*.

The threshold test is thus; whether there is a criminal process nexus or link between the punishment inflicted and the act which gave rise to its imposition.

Neither the Florida statutes which authorize the imposition of corporal educational discipline nor any pleading in this case suggests that this mode of discipline or the reasons therefor are in any way a part of the criminal process. No other statute has been found in which this form of discipline has been considered criminal. Only in the State of Texas is the nature of the act as a basis for criminal prosecution of the administrator even considered, and in that case as a specific *exclusion* from the criminal code. Tex. Penal Code §9.62 (1973).

The Fifth Circuit below affirmed this principle of the civil-criminal distinction. Other support for this conclusion can be found in *Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1974), aff'd _____ F.2d _____ (No. 75-1383, 6th Cir., decided June 15, 1976); *Gonyaw v. Gray*, 361 F.Supp. 366 (D. Vt. 1973); *Negrich v. Hohn*, 246 F.Supp. 173 (W.D. Pa. 1965), *aff'd* 379 F.2d 213 (3rd Cir. 1967).

As the court below pointed out, only one case, *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir. 1974), has held corporal

discipline in public schools to be subject to the Eighth Amendment, although a few district court decisions have assumed the result without really examining the problem. *See Ingraham v. Wright*, 525 F.2d 909, 913 (5th Cir. 1976) (footnote 3). An examination of those cases, and particularly of *Bramlet v. Wilson*, *supra*, quickly discloses that the treatment of the Eighth Amendment question has been superficial, at best. In *Bramlet*, for example the Eighth Circuit was dealing only with the face of a complaint dismissed below; the opinion was delivered by only two circuit judges, with the Chief Judge dissenting; and the opinion makes no analysis whatever of the history, intent or interpretation of the Eighth Amendment. In contrast, the decision of the Fifth Circuit now under review was rendered upon a full-blown record of proceedings including a week-long trial; it was decided *en banc*, with all but three judges concurring on the inapplicability of the Eighth Amendment; and it carefully traced the intent and meaning of the cruel and unusual punishment clause.

3. The Expansion of the Application of the Eighth Amendment Has Been Limited to Punishments Annexed to the Criminal Process.

There can be no doubt that this Court has extended the application of the cruel and unusual punishment clause since its adoption. However, the expansion that has occurred has, in each instance, been in the interpretation and meaning of the terms "cruel and unusual." The class protected by the Amendment, those punished pursuant to the criminal process, has never been expanded (nor has it been limited within that class).

In *Weems v. United States*, 217 U.S. 349 (1910), the Court reexamined and expanded the definition of "cruel and unusual" by comparing the nature of the crime with the severity of the punishment inflicted. The Court reasoned that while certain punishments may not be inherently cruel, their severity could be measured as cruel and unusual if the particular punishment does not fit the crime committed, within reasonable limitations.

The next extension occurred in *Trop v. Dulles*, 356 U.S. 86 (1958) where penalties imposed collateral to a criminal prosecution were found to give rise to Eighth Amendment treatment if such punishments were "penal" in nature. Since petitioners rely heavily on this decision, it is important to analyze just what the Court did and did not decide there.

Trop was decided in conjunction with *Perez v. Brownell*, 356 U.S. 44 (1958). Both cases involved the loss of citizenship for acts defined in The Nationality Act of 1940 as amended. 8 U.S.C. §1481. Perez lost his citizenship by voting in a foreign election. Trop lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.

In the *Perez* decision, the Court found that citizenship could be statutorily removed as a result of the citizen performing a proscribed act. Thus, the loss of citizenship could properly be imposed for the performance of a civilly precluded act.

In *Trop*, Chief Justice Warren distinguished *Perez* by first finding the criminal process nexus which was absent in *Perez*. From this nexus the Chief Justice then,

and only then, proceeded to examine denationalization from an Eighth Amendment perspective. Several excerpts from the opinion clearly show this analysis:

> "The statute in Perez decreed loss of citizenship —so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion."
>
> (356 U.S. at 93)

> "Section 401 (g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime."
>
> (356 U.S. at 99)

> "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice."
>
> (356 U.S. at 99-100)
>
> • • •
>
> "Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."
>
> (356 U.S. at 99-100)

> "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."
>
> (356 U.S. at 102)

The penalty imposed by the act was collateral to the punishment of confinement served by Trop. The Chief Justice therefore applied a secondary internal test to determine whether denationalization was "penal" or "non-penal." The analysis of the penal-non-penal distinction was not undertaken for the purpose of determining *whether* the Eighth Amendment consideration attaches, but rather for an additional internal determination that the collateral penalty imposed pursuant to a criminal prosecution was in and of itself penal in nature.

Thus the Chief Justice in *Trop* developed a secondary test to be applied when a penalty is collaterally attached to a criminal prosecution. The analysis used in the decision had three stages:

1. Whether there was a criminal process nexus to give rise to an Eighth Amendment consideration?

2. Whether the collateral punishment imposed was "penal" or "non-penal"?

3. Whether, if "penal," the punishment constituted cruel and unusual punishment?

The teaching of the decision in *Trop*, when compared to its companion case, *Perez*, is twofold: (1) There was an illumination of the process necessary to give rise to the cruel and unusual punishment consideration; and (2)

There was an expansion of those punishments which were considered cruel and unusual in light of the expanding concepts of human dignity.

The most recent expansion of the cruel and unusual punishment clause arose in *Robinson v. California*, 370 U.S. 660 (1962). California had enacted a statute making it a crime to "be addicted to the use of narcotics." The Court held that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts cruel and unusual punishment." 370 U.S. 660 at 667.

The thrust of this interpretation of the cruel and unusual punishment clause was expressed by Justice Marshall in *Powell v. Texas*, 392 U.S. 514, 533 (1968). "Criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*."

In sum, then, the decisional interpretation of the cruel and unusual punishment clause by this Court simply does not support petitioners' attempt to implant corporal discipline in public schools within the Eighth Amendment. The Court has clearly been willing, as in *Trop v. Dulles*, *supra*, to examine penalties in the light of "the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. Just as clearly, the Court has never held or even intimated that the Eighth Amendment has no bounds, and may be uncritically applied to corrections or punishments having nothing whatever to do with the process of criminal adjudication.

B. EXTENSION OF THE EIGHTH AMENDMENT TO SCHOOL PUNISHMENT IS INCONSISTENT WITH CONTROLLING AUTHORITY UNDER 42 U.S.C. SEC. 1983, UNNECESSARY IN VIEW OF STATE POLICY AND REMEDIES, AND UNWISE AS PRECEDENT.

We have sought to demonstrate that neither history, original intent, nor precedent place school discipline within the ambit of the Eighth Amendment. We turn now to the question whether the Amendment *should* be extended in the radical manner proposed by petitioners.

It is interesting to observe the ambivalence in petitioners' line of argument with respect to the constitutional status of corporal punishment in the schools. They concede, as they must, that "it may be premature to conclude that *all* corporal punishment violates . . ." (the Eighth Amendment). (Pet. Brief p. 35). They cannot resist, however, lapsing into suggestions that there is, or is developing, a general disapproval of corporal discipline, and that perhaps a total ban of the practice would be in order. This is *not* the issue in this case, nor do we believe that the matter is open to serious discussion. A brief digression, however, may help to place the policy considerations in perspective.

The decisions are in complete agreement that corporal punishment is not invalid *per se*, on any constitutional ground. Moderate physical punishment as a means of correcting misbehavior and enforcing discipline in the schools is sanctioned by historical principles of tort law, *see* 1 W. Blackstone, *Commentaries* *453; and by current prevailing legal standards. *See* Prosser, *The Law of Torts*, sec. 27, Defenses to Intentional Interferences with Persons or Property; *Restatement (Second) of Torts*, secs. 147(2)

and 153(2). The best indication of contemporary approval of corporal punishment in the public schools can be found in the widespread express legislative authority for the practice. Thirty-three states recognize and authorize corporal discipline by statute, either directly or by legislative adoption of the common law doctrine of *in loco parentis*. While two states prohibit the measure and there is considerable variation in local practice, the clear weight of state policy sanctions corporal discipline in the schools.[2] Florida's statutory history shows a legislative direction toward encouragement of this disciplinary measure, perhaps as a result of the studies and press reports of disorder and disruption in the schools which are all too common these days in this country.[3]

The true question which must be faced is whether instances of *severe* corporal punishment invoke such compelling considerations of principle as to require an entirely new and further extension of the Eighth Amendment. Petitioners appear to tackle this problem by the use of three very dubious rhetorical devices—the syllogism, the paradox, and the selection of language by this Court, out of context, as a postulate for argument.

The syllogism used by petitioners is a deceptively simple one. Excessive punishment by state officials under

[2]The statutory references are collected in petitioners' brief at footnotes 8, 9 and 10.

[3]Compare the earlier version of Florida Statutes sec. 232.27, which by negative implication authorized corporal punishment, with the extensive statutory enactments of the Florida Legislature in 1976 which define corporal punishment, delineate the procedures for its use, exempt principals and teachers from liability for employing it within authorized guidelines, and forbid Florida school boards from prohibiting the use of corporal punishment. The old and new statutory provisions are set forth in this brief at p. 2.

color of law is "cruel and unusual"—school administrators who punish excessively are acting for the state under color of law—therefore the Eighth Amendment must be violated. The first defect in this, of course, is the assumption that a severe corporal chastisement, although perceived to be both cruel and out of the ordinary in the literal understanding, must necessarily be viewed, constitutionally, as "cruel and unusual punishment." We have dealt with this in the preceding section of this brief. Beyond this, however, it is clear that gross or brutal misconduct by state officials is not perforce a deprivation of a *federal* right. As Justice Douglas observed in the (plurality) opinion which became the judgment of the Court in *Screws v. United States*, 325 U.S. 91, 108-109 (1945):

> "Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."

In *Screws* the Court was considering a conviction under sec. 20 of the Criminal Code, 18 U.S.C. sec. 52, presently to be found at 18 U.S.C. sec. 242. This was and is the criminal counterpart to 42 U.S.C. sec. 1983, under which the present action was brought. Screws, a Georgia sheriff, had beaten to death a prisoner in the course of an arrest for theft of a tire. The Court, obviously revolted by the brutality, upheld the constitutionality of the criminal statute by construing it to require proof of intent to deprive the victim of a *constitutional right* (the right to trial), not merely of intent to harm or kill him, and then reversed for

a new trial upon proper jury instructions with respect to Screws' intent. We recognize the element of willfulness required to satisfy the criminal statute, and that specific intent need not be proved as an element in a civil action under 42 U.S.C. sec. 1983. *Monroe v. Pape*, 365 U.S. 167 (1961). The point here, however, is that harm, even gross injury, by a state official acting under cloak of state authority does not automatically give rise to a federal cause of action. The record in this case, for example, at worst interpretation reflects no more than proof of assault and battery, which is not *per se* a federal case under 42 U.S.C. sec. 1983. *See Negrich v. Hohn*, 246 F.Supp. 173, 178 (W. D. Pa. 1965), *aff'd* 379 F.2d 213 (3rd Cir. 1965). This Court has just this year strongly rejected the view that the Fourteenth Amendment and sec. 1983 make actionable "many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims." *Paul v. Davis*, _____ U.S. _____, 96 S.Ct. 1155, 1159 (1976). The *en banc* decision of the Court of Appeals in this case made exactly the same point in these words (525 F.2d 909 at 915):

> "We do not mean to imply by our holding that we condone child abuse either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 Fla. Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law,

> *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery."

The clear lesson of the decisions interpreting 42 U.S.C. sec. 1983 is that not all official abuse or harm is remediable in the federal courts. The wrong complained of, if based on constitutional claims, must be distinctly seen as a violation of some discrete provision in the Constitution to which the plaintiff may look for protection. The Eighth Amendment simply should not be distorted to encompass the tort claims of paddled students. On this point, let us say in passing that we agree with petitioners that the availability of a state remedy does not in and of itself preclude federal relief in appropriate cases falling within the scope of sec. 1983. On the other hand, it is surely not irrelevant that full and adequate state remedies, both civil and criminal, are available to students who may be punished excessively. The civil rights legislation enacted after the Civil War, of which sec. 1983 is a descendant, was born for the purpose of vindicating the newly-won rights of the blacks, which were *not* being enforced in many states. See *Monroe v. Pape*, 365 U.S. 167, 172-183, for an exhaustive discussion of the origin and purpose of the "Ku Klux Act." There is no suggestion in this record, nor any argument by petitioners, that any state in the nation is any less vigilant in its concern for the protection of children than is the federal judiciary. The Florida statutes, for example, prescribe criminal penalties for child abuse. Florida Statutes, secs 827.03(3) and 827.07.

The paradoxical argument which petitioners offer to the Court refers to the decision below as refusing constitutional redress to school children, while "hardened criminals" may resort to the Eighth Amendment. Petitioners see this as an intolerable "anomaly." There are several answers. In the first place, the so-called anomaly is false, because the comparison is false. Perez lost his citizenship, while Trop regained his citizenship, by two decisions rendered by this Court on the same day, and perhaps Perez thought this somewhat anomalistic.[4] Yet he was without, and Trop was within, the true boundaries of the Eighth Amendment, and so the paradox disappears, as it does in the present case.

Secondly, it is not true to say, as petitioners suggest in their brief (p. 28), that corporal punishment administered to a student for an offense which also was a crime amounts to punishment "which would have been unconstitutional had he been convicted of the crime". Corporal punishment as a sentence for criminal infractions is indeed unusual nowadays, and prohibited in some states. E.g., N.D. Cent. Code sec. 1-47-26 (1960); S.D. Code sec. 13.4715 (1939). However, this is by state legislative policy and choice—no case has been found forbidding a state from choosing to employ corporal punishment, as the prescribed punishment for crime, on federal constitutional grounds. Sections of the Delaware Code (now repealed) which authorized lashes as a form of punishment were held constitutional in *State v. Cannon*, 190 A.2d 514 (Del. 1963), the Delaware Supreme Court observing that the Supreme Court of the United States had never ruled on the issue.

[4]Compare *Perez v. Brownell*, 356 U.S. 44 (1958) with *Trop v. Dulles*, 356 U.S. 86 (1958). The decisions are discussed earlier in this brief at p. 27.

So again the paradox dissolves, and as we have shown earlier, state policy with respect to school discipline, as expressed in statutes and the common law, is overwhelmingly approbative.

Finally, petitioners' paradox relies heavily on reference to *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), in which the flogging of prisoners in Arkansas penitentiaries was held to violate the Eighth Amendment, and to *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), holding that disciplinary beatings as inflicted in an Indiana juvenile reformatory warranted relief as having constituted cruel and unusual punishment. This Court has never ruled on the question, and as the Fifth Circuit pointedly observed in the decision below, prisons and public schools are not analogous for the purposes of Eighth Amendment scrutiny. Punishment to prisoners is clearly a collateral penalty, an extension of the original criminal sanction of confinement, and thus the *Jackson* and *Nelson* cases are well within the proper analytical scope of the Eighth Amendment as expounded by this Court. Furthermore, corporal punishment to prisoners, adult or juvenile, is easily seen as cruel and unusual, since the prisoners have already lost their liberty, and no rational purpose is served by inflicting pain rather than utilizing other means of correction at the jailers' disposal, such as isolating those guilty of misbehavior. Abuse is much more likely, given the seclusion of prisoners from their families and from public scrutiny.

None of these considerations apply to public school students. The purpose of educational discipline is correction, not retribution; students are not confined and may not be isolated in cells for mischievous behavior; and parental oversight, plus public access to the schools, press

and political process all work strongly to prevent unrestrained or excessive punishment by school personnel.

We turn now to two arguments made by petitioners, both based on phrases lifted out of context from Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86 (1958). Petitioners first fasten on the word "penal" as discussed in the opinion, and assert that corporal discipline in schools must be seen as penal in purpose, and therefore amenable to Eighth Amendment consideration. The whole quotation from the *Trop* opinion reads (356 U.S. at 96):

> "In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrong-doer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."

We have pointed out earlier that the Chief Justice only reached this formulation of a test of purpose *after* concluding that the Eighth Amendment had been invoked. Nevertheless, meeting petitioners' argument on its own terms, it borders on nonsense to say that the "purpose" of corporal discipline in public schools is penal in nature. The new Florida statute which defines corporal punishment embodies the universal understanding of the term, as ". . . the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules". Florida

Statutes sec. 228.041(28), as enacted by Laws of Florida, Ch. 76-236 (set forth *supra* at p. 3). The policy of the Dade County School Board in this case, again quoted out of context in petitioners' brief, provides this definition:

> "Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action."

Public educational systems function to transmit knowledge, and to guide the young in their development of morals and values. Those charged with the administration of public schools are not employed to punish, nor concerned with the correction of conduct, except secondarily. Nevertheless, schools cannot carry out their educational functions, as charged by legislatures and demanded by the public, in an environment of disorder, defiance, or disruption. The obvious purpose of corporal punishment, then, is to provide one method, among various alternatives, of maintaining the atmosphere of order and decorum which is indispensable to the life of the educational process.

The second misuse by petitioners of phraseology from the *Trop* opinion begins with the excerpt (356 U.S. at 100):

> "Fines, imprisonment and even execution may be imposed depending upon the enormity of the

> crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."

Petitioners then deftly excise one sentence from Justice Powell's dissent in *Goss v. Lopez*, 419 U.S. 565 (1975). We give the context here:

> "The State's interest, broadly put, is in the proper functioning of its public school system for the benefit of *all* pupils and the public generally. Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process. *Suspensions are one of the traditional means—ranging from keeping a student after class to permanent expulsion—used to maintain discipline in the schools.* It is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years."
>
> (419 U.S. at 591)

The sentence shown in emphasis above is then used by petitioners to support the startling view that only non-physical punishment is customary, and so corporal discipline is "suspect" and so presto!—the Eighth Amendment is invoked.

We hardly think that in the context of his reasoning, Justice Powell meant to exclude corporal punishment from the range of "traditional means" used to maintain school

discipline. As we have already shown, it is abundantly obvious that corporal discipline is both traditional, and widespread as accepted current practice. It cannot reasonably be viewed as "constitutionally suspect". On the other hand, if the Court is asked to focus only on *severe* corporal punishment as non-traditional and disproportionate and therefore "suspect", let us consider the implications of this approach. What about other severities in treatment which could equally be claimed as "suspect"? Would a non-traditional long-term suspension or expulsion from school for chewing gum in the classroom be suspect and thus trigger an Eighth Amendment inquiry? If a teacher punishes a student for minor misbehavior by imposing failing grades and preventing his graduation, the student suffers a severe hardship, but has the teacher violated the Eighth Amendment?

These extensions of petitioners' logic demonstrate again the improvidence of declaring the Eighth Amendment open to controversies arising out of school discipline. Mere tortious conduct capable of resolution in the state courts would be elevated to constitutional status. Every student disciplined by a teacher would have access to the federal courts for a determination whether a cruel and unusual punishment had taken place. A fresh new flood of federal litigation would be reasonably foreseeable, with a new host of difficulties for the trial and appellate judges, who would be fully into the business of deciding when and whether five or ten or more licks on the backside should become "cruel and unusual", when an assault is transformed into an unconstitutional assault, and how to charge juries to make nice constitutional distinctions.

The difficulties multiply. If the Eighth Amendment applies to school disciplinary incidents, then it logically should apply to any other incident of alleged excess by any other state official acting outside the realm of punishment connected with crime. The traffic officer who punches a motorist during an argument over a speeding ticket would violate the Constitution. Policemen, firemen, security guards or state building custodians who manhandle unruly members of a crowd while performing civil disciplinary duties would be candidates for constitutional litigation. The further development of "federal tort law" would benefit immensely. As Chief Justice Burger's famous phrase reminds us:

> "All that is good is not commanded by the Constitution and all that is bad is not forbidden by it."
>
> *Palmer v. Thompson*, 403 U.S. 217 at 228 (1971).

We do not mean to say that the prospect of a new onslaught of federal litigation is in itself reason enough to support an exclusionary interpretation of the Eighth Amendment. We do maintain that petitioners' attempt to inject school punishment cases within the bounds of the Amendment is a most drastic new reading of the intent and compass of this constitutional clause, and would open it to new ranges of approach and scope that are as broad and long as they are unforeseeable.

C. THE PUNISHMENTS IN THIS CASE WERE NOT EXCESSIVE BY ANY CONSTITUTIONAL VIEW.

Because the issue framed by the Court in granting the writ of certiorari is *whether* the Eighth Amendment

applies to severe corporal punishment administered as discipline, we have purposely not tried to argue that the particular punishments stressed by petitioners from the testimony of some of the students were not "cruel and unusual". If this Court finds the Eighth Amendment to extend to school discipline, presumably the case will be remanded for evidence by the defendants and rulings based upon such guidelines as the Court may establish.

In view of petitioners' heavy suggestions of hair-raising brutality, however, two points are worth making here. The District Judge who tried this case assumed that the Eighth Amendment *could apply* to corporal punishment in the public schools. Nevertheless, in dismissing the class action after hearing the plaintiffs' evidence, and while noting that some abuses had been shown, he concluded:

> "Corporal punishment of public school students, neither in and of itself, nor as prescribed and regulated in the Dade County School Board's policy and regulation, nor as administered in the school system, constitutes 'cruel and unusual punishment' within the intent of the Eighth Amendment to the Constitution. Considering the system as a whole, there is no showing of severe punishment degrading to human dignity, nor of the arbitrary infliction of severe punishment, nor of the unacceptability to contemporary society of corporal punishment in the schools, nor of excessive or disproportionately severe punishment."
>
> (App. 155)

As for the individual actions by Ingraham and Andrews, the judge found:

> "Plaintiff Ingraham's case rests on one instance of punishment, during which he received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks. Plaintiff Andrews was paddled several times, receiving no more than 5 licks on any one occasion. The paddlings caused painful bruises on Andrews' buttocks.
>
> The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment'. Therefore, a jury could not lawfully find that either of these plaintiffs sustained a deprivation of rights under the Eighth Amendment."
>
> (App. 148-149)

II

CONSTITUTIONAL DUE PROCESS PROCEDURES PRIOR TO ANY USE OF CORPORAL DISCIPLINE IN PUBLIC SCHOOLS ARE NOT THEORETICALLY REQUIRED NOR WORKABLE IN PRACTICE.

A. THE ISSUE BEFORE THE COURT IS WHETHER EACH AND EVERY INCIDENT OF CORPORAL DISCIPLINE DEMANDS PROCEDURAL DUE PROCESS.

As a prelude to discussing the procedural due process theories which petitioners advance, it is first necessary to clarify the problem which confronts the Court. The question as presented and argued by petitioners is internally paradoxical, and distorts the issue. Paraphrased, the question posed is whether the infliction of *severe* corporal punishment must be preceded by due process procedural steps mandated by the Fourteenth Amendment. Obviously enough, petitioners would not concede—nor would we contend—the converse proposition that preliminary procedural steps would legitimize the subsequent application of *severe* punishment. A rule of constitutional law which only required notice, a hearing, and other preliminaries as guarantees before excessive punishment would be foolish.

Petitioners recognize this dilemma and attempt to skirt the issue by creating their own custom-made definition of severe punishment "in the due process sense" (Pet. Brief p. 44, note 19). They offer this definition as "the infliction of bodily pain by an instrument designed to cause such pain", and do not include in the definition "a brief hand spanking or a slapped face". The argument is then launched without further justification of this artifice, or any examination of its theoretical and practical difficulties. In their focus on the uncommon instances of punishment, petitioners manage to ignore the ambiguities of their definitional premise. It is not clear whether the disciplinarian's hand is regarded as an approved instrument, and may be used without Fourteenth Amendment strictures, nor how a "brief hand spanking" is defined, nor how a slapped face comes to be exempted from due process. The definition places the paddle afoul of the Fourteenth Amendment, but leaves us without guidance as to the use

of rulers, blackboard pointers, gloves, or the like. The underlying question, left unattended, is whether the Supreme Court is being asked to classify and particularize a list of approved and unapproved kinds of corporal discipline and types of instruments—or whether the Court is being asked just to ignore these petty details and leave schoolteachers throughout the country to wonder when the due process clause applies in practice.

Petitioners' artificial and problematic definition simply will not do. It seems plain to us that the true issue before the Court is whether the Fourteenth Amendment mandates due process procedural requirements before *any* corporal punishment may be administered to public school students. (The National Education Association, in its brief as *amicus curiae* in support of petitioners (p.13) flatly contends for procedural rules "whenever corporal punishment is to be administered.") So understood, the issue not only becomes clear in its dimensions, and in its implications for state and local control of disciplinary measures in the schools. It also serves to illustrate the fallacy of dealing with the question, as do the petitioners, by stressing the exceptional instances of unreasonable punishment which may occur. Indeed, petitioners concede in their brief (p. 48) that "it cannot be said, except for Drew Junior High School, that severe corporal punishment in Dade County Schools was a common occurrence". That concession is in accord with the findings of the District Judge, who noted some abuses of the School Board policy (App. 152) but held that corporal punishment as administered throughout the school system was appropriate by Fourteenth Amendment standards (App. 155-156).

The point we make here is that exceptional instances of excessive punishment to students are aberrations, contrary to the intended place and purpose of corporal discipline in the schools, and the attempt to cure the aberrant cases by constitutional due process doctrine can be likened to the treatment of boils by the prescription of handcuffs. The handcuffs not only won't cure the boils, but they prevent the patient from attending to his ordinary business needs. No sensible due process rules can be devised to prevent only the extraordinary incidents of corporal punishment, and the mistaken stress on one out of 237 schools in Dade County led the original panel of the Fifth Circuit to an utterly unrealistic and unworkable conclusion. The panel in its opinion laid down due process requirements including such things as the production of eyewitnesses, the calling of witnesses on behalf of the student, and sufficient inquiries to insure that the student "is guilty beyond any reasonable doubt" (App. 175-176). Petitioners now do not even suggest a return to the panel's array of due process p. cedures, but they continue with the mistaken conception that because occasional excesses may occur, the prescription of constitutional procedures is the only and inevitable answer. Again, we submit that the excesses can and should be dealt with by resort to state remedies which are traditional and fully available. The question of need for procedural due process as a blanket prescription, which emerges as the real issue here, thus remains to be discussed, and we will follow the traditional two-step analysis used by petitioners.

B. ROUTINE CORPORAL PUNISHMENT PRESERVES THE STUDENT'S PROPERTY INTEREST IN EDUCATION, AND HAS TRIVIAL EFFECT ON HIS LIBERTY.

Where it not for the Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), we would have thought it not seriously arguable that public school students are possessed of a guaranteed right to be immune from corporal discipline for misbehavior except after *constitutionally required* procedural steps.

Except for *Goss*, we would have rested with the assurance given by the Court in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968):

> "Judicial interposition in the operation of the public school systems of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Except for *Goss*, we would have relied upon the broad principle stated in *Tinker v. Des Moines School District*, 393 U.S. 503, 507 (1969):

> "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

But the assurance of *Epperson* was honored only by distinction in the majority opinion in *Goss*, and the principle of *Tinker* was only cited regretfully in the dissent written by Justice Powell. Although we hope their vitality remains, neither of these general statements now provides its former reassurance that routine school disciplinary measures are to remain free from judicial oversight.

It is not for us, we think, to suggest that *Goss* be overruled so soon, although post-analysis of its ramifications is certainly appropriate for the Court's perspective. The most thoughtful critique of the decision is to be found in an extensive article by Professor Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Supreme Court Review 25.

It is for us, however, to urge with all earnestness that in the realm of judicial interposition in the discretionary spectrum of school disciplinary problems, this Court has gone just as far as it ought to go. Having constitutionalized the procedures for school suspensions, the Court should not be induced to venture still further into the thicket of educational decision-making. This is where the line should be drawn, or the Court is surely in for still more seductions to extend procedural due process to the many other routine and necessary school decisions made daily by teachers and principals throughout the land.

Having said this, we will deal with the problem of corporal discipline now at issue. Preliminarily, we should point out that the only corporal punishment case previously ruled upon by this Court has affirmed the authority of school administrators to choose corporal punishment as a disciplinary measure, in spite of parental objections.

Baker v. Owen, 395 F.Supp. 294 (M.D. N.C. 1975), *aff'd* 423 U.S. 907 (1975). Although the district court in *Baker v. Owen* found "minimal procedures" to be required prior to punishment, that issue was not before this Court, and the summary affirmance did not constitute a ruling on the issue, as the Fifth Circuit pointed out in its decision below (App. 187-188). Examination of the Jurisdictional Statement filed in *Baker v. Owen* proves that only the issue of parental consent was presented, and by the clear terms of Supreme Court Rule 15(1)(c) only that question was at bar.

One other district court, in an unreported decision, has in dicta indicated its view that a student must know the rule under which he is to be punished, and in cases of doubt as to identity of an offender, further inquiry should be made. *See Whatley v. Pike County Board of Education*, Civil Action No. 977 (N.D. Ga. 1971).

The *Baker* and *Whatley* cases are the only authorities for the view that constitutional due process attaches to corporal discipline in schools. No Court of Appeals has so held, and the other federal courts which have directly ruled on the issue have rejected the idea, as has the Fifth Circuit in the present case. *Sims v. Board of Education*, 329 F.Supp. 678 (D.C. N.Mex. 1971); *Gonyaw v. Gray*, 361 F.Supp. 366 (D.Vt. 1973); *Ingraham v. Wright* (App. 180). *Cf. Sims v. Waln*, __ F.2d __, (No. 75-1383, 6th Cir. June 15, 1976); *Coffman v. Kuehler*, 409 F.Supp. 546 (N.D. Tex. 1976).

Utilizing traditional due process analysis, with the *Goss* decision as the bench mark, we look first to the right or interest asserted by petitioners as having protected

status. A glaring difference immediately appears between the nature of the penalty involved in *Goss*, compared to routine corporal discipline. Suspension from school removes a student from the educational process. Corporal punishment imposes temporary bodily discomfort while keeping the student in school and at work.

The Court in *Goss* found suspension to be a deprivation of a substantial property interest (education) conferred by the state of Ohio, with consequential effects upon the student's employment prospects and reputation. The majority of the Court were clearly concerned that suspensions were, for the students, *exclusion from the educational process.* In contrast, the very purpose of corporal punishment as a disciplinary measure is to avoid exclusion of the student from his studies. He suffers no property loss, and his interest in being free from pain in the posterior, while real enough to the misbehaving student, has no realistic implications for his future employment or standing in the community.

Petitioners make a stab at finding a "property interest" here, by suggesting that James Ingraham was "driven from school" by his paddling, and thus deprived of education while out of class. Aside from the utter lack of proof that Mr. Wright intended such a result, and some doubt about whether Ingraham could have come back to school earlier if he had really wanted to (no one forbade his return), this argument again shows how the due process analysis is only confused by dwelling on out-of-the-ordinary punishments. The inevitable result of suspension is some loss of education — the common result of corporal discipline is correction only, with no break in classroom instruction, and certainly no deprivation of

educational entitlement. Before leaving this point, we note that the evidence at the trial utterly failed to show any educational retardation, much less deprivation, stemming from corporal punishment. With the exception of one child who repeated a grade for reasons unexplained (R. 587), the other Drew Junior High students progressed more or less normally. Ingraham continued in school to senior high until he was committed to Juvenile Hall for threatening a teacher (App. 88-89). Andrews progressed to senior high, where he was expelled for having a knife (App. 90, 117). The other students showed a consistent pattern of progression through school (R. 433-434, 438-439, 462, 488, 490, 544-545, 643, 644, 807-808, 848-849, 862-863).

Petitioners' main thrust is an effort to find a "liberty" interest of constitutional dimensions. In this connection, the analysis must heed the Court's decision, subsequent to *Goss*, in *Paul v. Davis*, — U.S. —, 96 S.Ct. 1155 (1976). The Court there holds that for a federal cause of action to arise under 42 U.S.C. sec. 1983, there must be a deprivation of a *right*, secured either by state law or the Constitution, not merely an incident of tortious conduct by a state employee. Neither the law of Florida nor the Fourteenth Amendment can be said to guarantee a public school student the right to attend school free of physical discomfort as punishment for misconduct. As we have noted earlier, Florida law now clearly approves, as well as regulates, corporal discipline in schools.

Perhaps with this problem in mind, petitioners first look to the Fourth Amendment, and see it as somehow embodying the liberty right they seek. This is startling for two reasons. First, no court has ever perceived school

discipline as such an affront to privacy or dignity as to offend the Fourth Amendment, and neither of the cases relied upon by petitioners lends the slightest support to their notion. In both *Schmerber v. California*, 384 U.S. 757 (1966) and in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court dealt with police search-and-seizure issues, obviously within the literal scope of the Fourth Amendment, and in both cases the disputed evidence obtained by the police was declared admissible and the resulting convictions were affirmed. Secondly, aside from being inserted in the plaintiffs' complaint which began this suit in 1971, the Fourth Amendment has never been mentioned again, and was neither argued to nor considered by the Court of Appeals. Petitioners' resort now to the Fourth Amendment is too late and entirely too far-fetched.

In further pursuit of a liberty interest, petitioners attempt to find in corporal punishment some constitutional trespass to physical integrity and reputation, and also suggest psychological harm as a factor.

It is appropriate, we think, to remember first that the Fourteenth Amendment literally prescribed that no state shall "deprive" any person of liberty. Deprive means *take away*, and whether we think in terms of property or liberty, the temporary detention and discomfort which accompany routine corporal discipline cannot be seen to meet the constitutional text, except by an exercise of desire rather than reason. The Court's recent flow of due process cases, including *Goss*, can consistently be read as the imposition of notice and hearing requirements only where an actual loss, either of property or genuine status,

is threatened by state action. *See* Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Supreme Court Review 25, 50-52.

If we must look beyond textual definition, however, petitioners' theories of harm hardly establish that ordinary corporal punishment sufficiently implicates a student's liberty interest so as to invoke the Fourteenth Amendment and procedural forms as a consequence. In the first place, a routine incident of spanking or paddling is indeed a trivial and transitory physical event. It cannot be equated with a 10-day suspension as "a serious event in the life" of the child. *See Goss, supra* at 576. A spanked child would see the matter differently, of course, but we cannot read the Constitution with childish eyes without risking childish results. The answer to the child, and the answer to petitioners, is:

> "The State's generalized interest in maintaining an orderly school system is not incompatible with the individual interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite challenge to the teacher's authority — an invitation which rebellious or even merely spirited teenagers are likely to accept."

Goss v. Lopez, supra at 592-593 (Justice Powell dissenting).

As for the "psychological harm" apprehended by petitioners, the answer seems obvious. The one witness who expounded on this at the trial, an assistant professor of educational psychology, had the view that *all* corporal punishment could produce anxiety, frustration, hostility, and so forth. This may be a policy reason for abolishing corporal discipline in schools, but no amount of due process procedural requirements will solve the problem, if it is a problem. Procedural steps and delays, even "informal" ones, would be calculated to worsen, rather than avoid mental distress to the candidate for corporal punishment.

Finally, petitioners fasten on the idea that corporal discipline injures the reputations of school children, and inflicts a lasting stigma. In *Goss*, the Court found suspensions, once recorded, capable of damaging a student's standing with his peers and teachers, and of interfering with later opportunities for higher education and employment. The present case, however, presents no such picture. There is nothing in the record, nor in common experience, to support the idea that a paddling brings upon the student anything more serious than the kidding of his friends. James Ingraham's testimony on this, quoted in petitioners' brief with due solemnity (p. 47), is adequate proof of our point. Male chauvinists among us, if any are left, might

remember a paddling by the principal as a mark of honorable achievement in the eyes of one's boyhood friends. Not to be facetious, though, it passes belief that school spankings can be perceived as having *any* damaging or lasting consequences to reputation, honor or integrity. Some of the students who testified below said they were embarrassed by their punishments — and others were not. James Ingraham was ashamed to tell his mother (App. 77), but not embarrassed when paddled with other class members (App. 85). Roosevelt Andrews felt "normal" about being paddled in the eighth grade (App. 98) and said being whacked with a ruler in elementary school helped him behave (App. 118). Is this sort of juvenile mishap really to be the source of constitutional concern?

Nor is there any merit to the suggestion that future education or employment are jeopardized by corporal discipline. Petitioners do not even try to meet this test as set forth in *Goss*, but the National Education Association, in its grief as *amicus curiae*, notes that the Dade County School Board policy requires a log to be kept by each principal of the details of each instance of corporal punishment (App. 132). The NEA argues that the record could later mar a student's reputation. Thus, a regulation adopted to insure reasonableness of punishment and better administrative controls is turned about to predict harm to the students! The argument is false, however, for this information is protected from publicity under both state and federal law. The cumulative records of Florida students, which contain their educational history and progress information (App. 31), also contain records of disciplinary measures. See, for example, the cumulative records of James Ingraham and Roosevelt Andrews, which were introduced in evidence. Pl. Exh. 12, 13; R. 253. Florida Statutes sec.

232.23 limits inspection of these records to some school district personnel, the pupil's parent or guardian, a court, and persons authorized in writing by the parent, guardian or principal. In addition, the new Family Educational Rights and Privacy Act of 1974, known as the "Buckley Amendment", restricts the release of education records or "personally identifiable information" (on pain of losing federal funds), except to specified persons and agencies,[5] without written consent of the parents, or of the student himself if over the age of eighteen. 20 U.S.C. sec. 1232g.

Having dealt with the illusory "right" which petitioners claim for students faced with corporal discipline, it should be in order to look at the interests of school administractors and the public in maintaining order and a climate conducive to learning in the schools. The rising concern in the nation over disorder and disruption in the public schools is amply documented and justified. Justice Powell, dissenting in *Goss*, made and supported this point fully. See *Goss v. Lopez*, 419 U.S. 565 at 592. See also the discussion and sources in Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Supreme Court Review 25, 64-66. This is not to argue for more and harder beatings, but only to suggest that in a consideration of ordinary, garden-variety corporal discipline, the so-called liberty interest of the student has to be seen in the perspective of the needs of hard-pressed educators for effective and effici-

[5]Among the authorized recipients of information are "officials of other schools or school systems in which the student seeks or intends to enroll". Parents, however, have a right to a hearing to challenge the content of the record. In any event, only speculation supports the assertion that notations of spankings in school are likely to lead college registrars to deny admission to students otherwise qualified.

ent disciplinary alternatives. Corporal punishment is one such alternative. It is not likely to remain so if constitutional procedures, even "informal" procedures, are mandated for any paddling of whatever sort, for whatever offense. History and state legislative policy clearly show that American society and its laws have arrived at a balance of interests in respect to school punishment, which approves corporal discipline and trusts educators to administer it under state and local control, while providing remedies against abuse. This Court, we submit, should not destroy that balance by now imposing constitutional mechanics in this area of educational authority.

Our conclusion here is strongly reinforced by this Court's very recent decision in *Bishop v. Wood*, ____ U.S. ___, 96 S.Ct. 2074 (1976). The Court there found neither a property nor liberty interest sufficient to invoke due process procedures on behalf of a discharged "permanent employee' of a city, even assuming that he was discharged for false or mistaken reasons. In language which precisely makes our point here, Justice Stevens observed:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error."
>
> (96 S.Ct. at 2080)

C. EVEN "MINIMAL" PROCEDURES BY CONSTITUTIONAL DECREE ARE INAPPROPRIATE AND SUPERFLUOUS, AND IN THE END SELF-DEFEATING

Although it is our firm position that constitutional due process procedures are not required in connection with corporal discipline, the mechanics suggested by petitioners deserve some attention. It will be seen, we believe, that even the "minimal" steps suggested are neither necessary, desirable, nor workable.

1. Notice and Opportunity To Be Heard

It is seductively simply for petitioners to recommend this classic due process element, and to propose it as some sort of informal dialogue. A common sense view of the proposal discloses it to be ambiguous and superfluous.

Petitioners first insist that a code of discipline is mandatory, so that a student will be informed beforehand that "specific misbehavior" could result in corporal punishment. This may sound reasonable at first blush, but as a *constitutional* principle in the public school context it is probably impossible, and certainly unclear. We would suggest that an attempt to draw a list of infractions as notice of corporal offenses would be a futile exercise, for it would either be too broad and general to be informative to young children ("misconduct in class", for example), or else endless in its particularity and in the final analysis, incomplete to encompass all possible variations of student mischief. It would remove judgmental discretion by educators and might even increase the incidence of corporal punishment by allowing unimaginative or overly-zealous school officials simply to check the list and pick up the

paddle, rather than trying to understand and deal flexibly with a student's behavior problem .

Petitioners next suggest that the student need only be told what he is accused of doing and the basis of the accusation, and that the hearing must be at least an informal give and take before punishment. The suggestion makes sense, but it is totally unnecessary as a constitutional rule for public schools. For one thing, the written regulation of the Dade County School Board (App. 131) has required for years that the student in every case "be told of the seriousness of the offense and the reason for the punishment". For another, it is certainly within common understanding and experience of teacher-pupil relationships that some "give and take" will happen whenever an educator proposes to impose corporal discipline. Teachers and students are not opponents or adversaries, and it must be a rare case when a youngster is actually unaware of the misconduct which is charged to him, and has no chance at all to deny it or tell his story. The record of the students' testimony in this case proves the emptiness of petitioners' contention. Neither Ingraham nor Andrews was in doubt about the acts of misconduct for which they were paddled. (App. 72, 85-87, 93-95, 97-98, 100, 102, 105-106, 107-110, 113).

With no clear exceptions from the often confusing testimony, all the other Drew Junior High students knew why they were being punished, even though some denied misconduct or thought the discipline unfair. (R. 418, 430-431, 435, 455, 467-469, 485, 493-496, 499, 501, 516-517, 522, 523, 546-547, 554, 588, 594, 604, 621, 624, 630-631, 633, 637-639, 642, 645, 647, 649-650, 653, 659, 809, 817, 822, 850, 854, 864, 867-870, 877-879). If we concede that

in some cases the punishments may have been mistaken or inequitable, our point remains that the essential rudiments of notice and opportunity to speak are actually inherent in the realities of school-discipline situations. Thus the "hearing" procedure suggested by petitioners, if it is to be as truly informal as they say, adds nothing to common practice. It can even be seen as illusory, in terms of results. The imposition of a constitutional requirement for such a hearing is highly unlikely to affect many substantive decisions made by those hardy administrators who continue to use corporal punishment as a disciplinary tool. On the other hand, it opens a fertile field for new federal damage suits, in which the student is pitted against the teacher in testimony about whether or not the student's constitutional rights were violated because he was or was not advised of his "specific misbehavior," and was or was not listened to before he was punished.

It is also appropriate here to refer again to the new Florida legislation, Laws of Florida Ch. 76-236, which in authorizing corporal punishment, provides as a statutory procedure that punishment must be administered "only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment". The same act, in requiring each Florida school board to adopt a code of student conduct for distribution to school personnel, students, and parents, specifies that the code shall contain, among other things, ". . . procedures to be followed for acts requiring discipline, including corporal punishment . . ." While these requirements would not entirely satisfy the petitioners' definition of notice and hearing, it is clear that the state itself is choosing to regulate corporal discipline directly and through its school boards.

Perhaps the question then becomes why a federal rule is unacceptable, if the state is itself providing some elements of procedure. The first answer is found again in the basic commitment to state and local control of education without unnecessary judicial interference, which this Court recognized in *Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), and gave at least honorable mention in *Goss v. Lopez*, 419 U.S. 565 at 582 (1975). State and local educational authorities, faced with many different kinds of student trends and disciplinary problems, may well wish to experiment with more or less regulation of routine corporal discipline. It is quite another thing to fasten a constitutional standard on the schools of the nation, and freeze educational authority into a federal mold.

Even more important here is the foreseeable impact upon the teachers and administrators in the schools. There can be no doubt that federal mandates, and the prospect of federal litigation, are chilling to lay educators. Beset already with restrictions and threats to their authority, educators are also acutely aware of the sword of personal liability which hangs over their heads since the Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975). If they are now to be told that the United States Constitution requires due process procedures prior to every use of corporal discipline, no matter how bland the description of the process may be, school officials are necessarily going to see each choice of corporal punishment as laden with the risk of being haled into federal court on claims of procedural flaws. The results are likely to be in two directions, both undesirable. Conscientious educators, in order to protect themselves in using corporal punishment, will over-formalize and document the pre-spanking procedures, and thus

prolong the anxiety of the students and defeat the proper function of the discipline as swift and non-disruptive of the educational process. This would have the added effect of further diverting school resources and administrative time from educational concerns, a factor recognized by both the majority and dissenting opinions in *Goss v. Lopez*, 419 U.S. 565 at 583, 594 (1975). On the other hand, less imaginative but still frightened administrators will find it simpler to discard corporal discipline as a viable measure, and either ignore misconduct or turn to more stringent penalties such as suspension or expulsion from school.

Neither of these alternatives is sensible as a goal, but they both are predictable as results of a new federal mandate for a prior hearing in every case of corporal discipline. The second alternative, likely enough, would tend indirectly to the abolition of corporal punishment in the schools. This would no doubt be satisfactory to petitioners, but it obviously would be at cross-purposes with the needs of American society as clearly expressed in its legislation and common law.

2. A Neutral Arbiter of Punishment

Petitioners suggest the rule that "a neutral person decide the need for punishment and impose it if necessary". This is a fresh new conception, for no court has yet seen this need, not even the panel of the Fifth Circuit which originally considered this case and suggested a formidable list of other due process procedures. The Dade County School Board regulation (App. 131) places the responsibility on the school principal to determine the need and authorize the punishment in each case. The new Florida law (p. 2, supra) is less strict, requiring the principal to

approve corporal punishment in principle before it is used, but not in each specific instance. Surely this is enough, without the addition of a constitutional arbiter in each and every case.

There is little else we can say about this, except that the suggestion would surely guarantee a formal process, contrary to petitioners' avowed intent. The intervention of a "neutral" party to adjudicate between teacher and student, or between principal and student, would necessarily involve the delay, complication of schedules, diversion of resources, student anxiety and loss of instruction, and adversary atmosphere that even petitioners see as undesirable. This notion can only be seen as expensive, time-consuming and needless in the context of public school operations.

CONCLUSION

The Court of Appeals for the Fifth Circuit first introduced the Constitution to the campus, and has never been slow to recognize and articulate the essential rights of students within the context of public educational institutions. *See generally* Wright, *The Constitution on the Campus*, 22 Vanderbilt L.Rev. 1027 (1969). Now that court, sitting *en banc*, has clearly and carefully drawn the line and refused to read into the Constitution new and inappropriate and unnecessary avenues for fresh traffic in federal litigation over incidents of corporal punishment in the schools.

Punishments will occasionally exceed moderate proportions, but it does not follow that these incidents must reach constitutional proportions. Adequate state remedies are available, and the Eighth Amendment should not be warped from its true intent and meaning.

By any realistic appraisal, the time-honored and almost universal use of moderate corporal punishment as a prompt disciplinary measure in public schools is a rational alternative to more drastic exclusionary devices. The Fourteenth Amendment does not command, nor does experience suggest, the necessity that federal courts must lay down formal due process procedures to satisfy the emotional notion that the transitory discomfort of a paddling somehow deprives a school child of a constitutional right.

The *en banc* decision below is comprehensive and correct and should be affirmed.

Respectfully submitted,

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